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IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

JOHN J. McGIRL and GEORGE FURST, Trustees of SOLAR MANUFACTURING CORPORATION,

Petitioners,

vs.

BEN MINTZ and SECURITIES & EXCHANGE COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES D. CARPENTER,
SAMUEL M. COOMBS, JR.,
Counsel for Trustees-Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John J. McGirl and George Furst, Trustees of Solar Manufacturing Corporation, a corporation, debtor, in reorganization under Chapter X of the Bankruptcy Act, petition for a writ of certiorari to review a decision and judgment of the United States Court of Appeals for the Third Circuit reversing the order of the United States District Court for the District of New Jersey dated January 4, 1951, sitting as a court of bankruptcy in the reorganization proceedings of the said debtor, which said order denied the petition of the Securities & Exchange Commission to reduce the number of the trustees of the debtor.

Jurisdiction.

Judgment of the United States Court of Appeals for the Third Circuit was entered on June 28, 1951. The opinion of the United States Court of Appeals for the Third Circuit is reported in 190 F. (2d) 273. A petition for rehearing was filed by the trustees of the debtor on July 13, 1951, and was denied by the United States Court of Appeals for the Third Circuit on August 20, 1951. The jurisdiction of this court is invoked under Title 28, Section 1254-1 of the U. S. Code.

The Nature of the Proceedings.

This case arises from a petition of the Securities & Exchange Commission filed on December 18, 1950 in the United States District Court for the District of New Jersey to determine whether the two trustees originally appointed by the District Court at the time the petition for reorganization of the debtor was filed on December 14, 1948, should be reduced to one (R. 2-5). The District Court denied the petition of the Securities & Exchange Commission, and entered its order thereon on January 4, 1951 (R. 26). From this decision an appeal was taken to the United States Court of Appeals for the Third Circuit by Ben Mintz, a creditor (R. 27), and on June 28, 1951 that Court decided that the District Court had erred in not granting the relief prayed for in the petition of the Securities & Exchange Commission, and on the same day entered its judgment reversing the order of the District Court (R. 49-51, 52). This decision of the United States Court of Appeals for the Third Circuit is the first decision involving the District Court's power to retain or remove the

trustees appointed by it (under Section 160 of the Bankruptcy Act, 11 U. S. C. A. 560)

(Insert top of Page 3 at end of "The Nature of the Proceedings".)

The trustees filed their petition for rehearing in the United States Court of Appeals for the Third Circuit on July 13, 1951 (R. 53-65). The United States Court of Appeals for the Third Circuit on August 20, 1951 filed its Order denying rehearing, McLaughlin, Circuit Judge, dissenting (R. 66).

Did the District Court acting under Section 160 of the Bankruptcy Act, 11 U. S. C. A. 560, which provides as follows:

> "In any case the Judge at any time, without or upon cause shown, may appoint additional trustees or remove trustees and appoint substitute trustees"

in retaining as it did the two trustees appointed by it and refusing to grant the relief prayed for in the petition of the Securities and Exchange Commission to reduce the number of trustees to one, commit a gross abuse of discretion amounting to an error of law?

II.

Did the United States Court of Appeals for the Third Circuit as an Appellate Court reviewing the action of the District Court, in refusing to remove one of the trustees appointed by the District Court, have the power to direct the District Court to remove one of the trustees appointed by the District Court in the absence of a clear showing that the District Court had committed a gross abuse of discretion amounting to an error of law in interpreting the statute under which it was acting, to wit, Section 160 of the Bankruptcy Act, 11 U. S. C. A. 560?

Summary Statement of the Matters Involved.

On December 14, 1948 Solar Manufacturing Corporation filed its voluntary petition for reorganization in the District Court of the United States for the District of New Jersey under Chapter X of the Bankruptcy Act, and on the same day petitioners John J. McGirl and George Furst were appointed trustees of the debtor corporation. Upon notice to all creditors, stockholders and other parties in interest, the trustees were continued as such trustees by order dated January 31, 1949 (R. 2, 29, 42).

The trustee John J. McGirl is a certified public accountant of New York State residing in Hoboken, New Jersey. He has been a certified public accountant for the past twenty-five years. The trustee George Furst is a practicing attorney in Newark, New Jersey. He was admitted to the Bar of the State of New Jersey in 1912 (R. 6, 56).

The trustees have continuously acted as trustees of the debtor corporation since their appointment as aforesaid.

The debtor was formed as a New York corporation on February 3, 1932 and was engaged in the manufacture of capacitors of all types (R. 2, 29). At the time the reorganization petition was filed, the debtor had plants in North Bergen, Bayonne and Paterson, New Jersey (R. 29).

Under the order of the Court, the trustees continued manufacturing operations of the debtor from the date of their appointment until about August 31, 1949, when the Court ordered them to terminate such operations. The trustees have received from all sources, since the date of their appointment as trustees, to wit, December 14, 1948 to November 16, 1950, the sum of $3,786,194.49 and have paid out, in the operation of the business and in payment of secured and priority claims and partial cost of administra-

tion, the sum of $2,619,848.23, each of the aforesaid amounts include $445,863.31, representing inter-company transfers, leaving a cash balance as of November 15, 1950 in the amount of $1,166,346.26 (R. 3, 7).

On April 3, 1950, after lengthy hearings, the plan of reorganization of the trustees, dated February 20, 1950, was confirmed by the Court. Under this plan, 100,000 shares of $1.00 par value common stock of the debtor corporation were sold for the sum of $815,000.00. The trustees reserved all cash in their possession and all causes of action. The sale of the stock of the debtor corporation carried with it all of the assets of the debtor corporation, except the cash and the causes of action reserved by the trustees, as stated (R. 3).

From the time the plan of reorganization was confirmed on April 3, 1950, the trustees were continuously and almost daily engaged in consummating the plan of the reorganization under the orders of the Court in aid of consummation. They were also engaged in contesting many large claims filed with the trustees under the orders of the Court, which claims had been disallowed by them as trustees. Aside from these many obligations devolving upon them as trustees, they with counsel were engaged in the preparation of complicated and complex litigation which required careful study and preparation and which has since the filing of the petition of the Securities & Exchange Commission continued to require much careful study and preparation by them in order to properly prepare the suit since brought against the Marine Midland Trust Company of New York. Such suit involves the alleged negligence of that bank in the management of its trust under a trust indenture under which it was acting as indenture trustee. It also involves the recovery of certain preferential payments received by the bank on notes of the debtor corpora-

tion held by it, which payments are believed to be in violation of certain provisions of the Bankruptcy Act and the statutes of the States of New Jersey and New York and also involves the recovery of certain profits made by it in the alleged purchase of the accounts receivable in violation of the provisions of the trust indenture under which it was acting. This litigation involves in excess of three-quarters of a million dollars (R. 44).

Another suit of equal importance is the suit against the Sterling National Bank & Trust Company of New York for the recovery of preferential payments received by it upon a note of the debtor corporation, which preferential payments the trustees and counsel believe to be in violation of the pertinent provisions of the Bankruptcy Act and the applicable statutes of the States of New Jersey and New York. This suit also involves a recovery in excess of one-half million dollars (R. 44).

The trustees were also engaged in the investigation and the preparation for possible suits against officers and directors and certain parties who may have breached an agreement to underwrite certain securities to the damage of the debtor and to creditors in this proceeding. All of these matters involved extensive 21-A examinations and examinations under the rules of federal procedure (R. 44-45).

The trustees were also engaged and still are engaged in litigation involving claims disallowed by them in an amount in excess of $200,000 (R. 45).

Upon the filing of the petition of the Securities & Exchange Commission, the District Court conducted a full investigation into the merits of the petition, and on December 28, 1950 filed its opinion in which the Court stated "First, I was not impressed with the argument that there should be a change in the trusteeship at this critical time. However, any subsequent fees or allowances made to the

trustees must of necessity be small. They are both still needed to aid in the preparation and institution of the suits which are to be commenced in the very near future" (R. 25).

In accordance with its opinion, the District Court on January 4, 1951 signed an order denying the petition of the Securities & Exchange Commission to reduce the number of trustees to one (R. 26).

Reasons Why a Writ of Certiorari Should Issue.

I.

The United States Court of Appeals for the Third Circuit has decided an important question of federal law which has not been but should be settled by this Court. Petitioners know of no other decision interpreting the discretionary powers of the District Court when acting under Section 160 of the Bankruptcy Act, 11 U. S. C. A. 560. Petitioners believe that this petition for certiorari should be granted because of the vital importance of the decision of the Appellate Court not only to the judges of the District Courts throughout the United States who have as one of their duties, under the appropriate sections of the Bankruptcy Act, the appointment and removal of trustees but also to trustees who are appointed by the District Judges. The question involved in this case is a question of general importance which has not been but which should be settled by this Court.

Eisler v. *U. S.*, 338 U. S. 195, 93 L. Ed., 1901.

II.

The United States Court of Appeals for the Third Circuit has decided a federal question as to the juris-

diction and discretion of District Judges in bankruptcy matters in a way probably in conflict with the following applicable decisions of this Court and the decisions of the Appellate Courts of other Circuit Courts of Appeal as well as in conflict with its own decisions in similar cases. Section 160 of the Bankruptcy Act, 11 U. S. C. A. 560 places an almost absolute discretion in the District Court in the appointment and removal of trustees in reorganization proceedings. Appellate Courts in matters involving the discretion of the District Court have uniformly held that a District Court will only be reversed for a gross abuse of discretion amounting to an error at law.

Dickinson Industrial Site v. *Cowan,* 309 U. S. 382;

In re Margolies, et al., 266 F. 203 (C. A. 2, 1920);

In re Brown, 87 F. (2d), 306 (C. A. 2, 1937);

Quinn v. *Gardner,* 32 F. (2d), 772 (C. A. 8, 1929);

In re McGann Mfg. Co. Inc., 195 F. (2d) 845 (C. A. 3, 1951).

III.

The United States Court of Appeals for the Third Circuit has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision. The United States Court of Appeals for the Third Circuit in the case *sub judice* while holding in its opinion that the question involved is "for the discretion of the District Court" and that "such discretion is particularly appropriate in this type of case which necessarily involves passing upon ever so many administrative matters in the course of a reorganization

proceeding" and that "no Appellate Court with the proper record before it, even though advised by the most eloquent of counsel, can have the feel of a case as the judge who has lived with it week to week and month to month" (R. 49), nevertheless in the latter part of its opinion reversed the order of the District Court refusing to remove one of the trustees. Petitioners believe that this was done without a finding that the district judge had committed a gross breach of discretion amounting to an error of law in the application of said Section 160, Title 11 U. S. C. A. 560, under which he was acting.

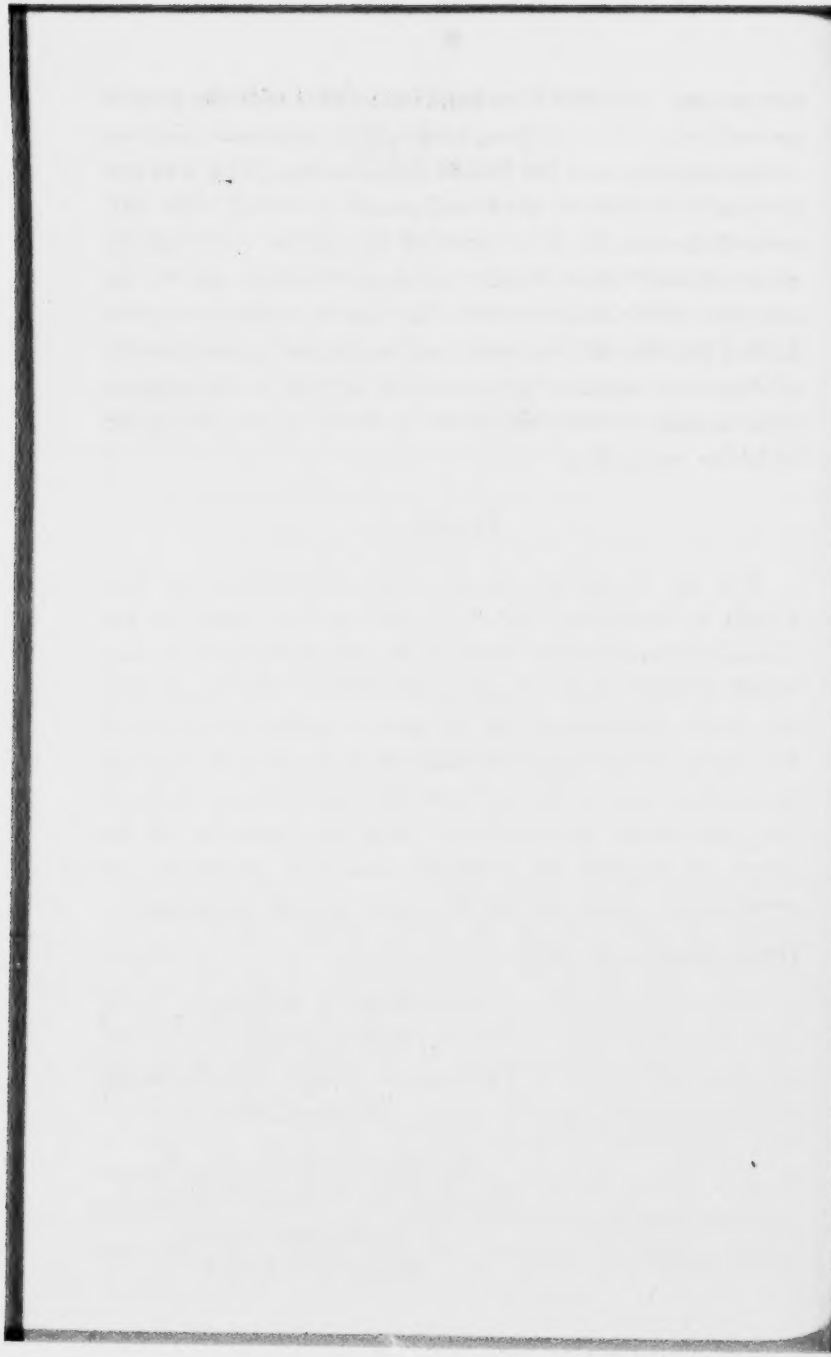
Prayer.

For the foregoing reasons your petitioners pray that a writ of certiorari may issue out of this Court to the United States Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court, on a day to be determined, the full and complete transcript of the record of all the proceedings of such Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed, and that petitioners be granted such other and further relief as may be proper.

Dated, October 15, 1951.

JOHN J. MCGIRL,
GEORGE FURST,
Trustees of Solar Manufacturing Corporation,

By SAMUEL M. COOMBS, JR.,
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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court's opinion is reported in 94 F. Supp. 878 and appears in the record at pages 25-26. The opinion of the United States Court of Appeals for the Third Circuit is reported in 190 Fed. 2d 273 and appears in the record at pages 49-51.

Statement of the Case.

A summary of the statement of the case is given in the petition at pages 4 to 7 inclusive above.

It seems appropriate, however, to emphasize that fundamental error in the Circuit Court's decision is that while the Court held that the question involved was one for the discretion of the District Court, it nevertheless reversed the order of the District Court without a proper finding that the District Judge had committed a gross breach of discretion amounting to an error of law in the application of Section 160 of the Bankruptcy Law, Title 11 U. S. C. A. Sec. 560, under which the District Judge was acting.

POINT I.

The District Court acting under Section 160 of the Bankruptcy Act, 11 U. S. C. A. 560, by its order retaining the two trustees originally appointed by it and refusing to grant the relief prayed for in the petition of the Securities & Exchange Commission to reduce the number of trustees, did not commit a gross abuse of discretion amounting to an error of law.

In its opinion the United States Court of Appeals for the Third Circuit stated:

> "We start with the undisputed premise that the matters in question are for the discretion of the dis-

trict judge (*Dickinson Industrial Side* v. *Cowan*, 309 U. S. 382, 389 (1940); *In re McGann Mfg. Co.*, 188 F. 2d 110, 112 (3d Cir. 1951). Such discretion is particularly appropriate in this type case which necessarily involves passing upon ever so many administrative matters in the course of a reorganization proceeding. No appellate court with the paper record before it, even though advised by the most eloquent of counsel, can have the feel of a case as the judge who has lived with it week to week and month to month (R. 49).

• • • • • •

"With regard to the denial of the order to cut down the number of trustees to one, we find ourselves unable to concur with the trial judge, even bearing in mind that the matter is one for his discretion in the first instance. When the trustees took over, this company was in the manufacturing business. It had a force of several hundred employees; it operated as a going concern. The appointment of two trustees under the circumstances was plainly proper.

"Since that time the physical assets have been sold. One phase of that sale was before this Court *in re Solar Mfg. Corp.*, 176 Fed. 2d, 493 (1949). There is now no business to run. The future operations on behalf of this company consist in following up certain claims it asserts against third parties and litigating those claims if need be. The business, except for distribution of the assets on hand and those which may, from time to time, be recovered, is legal business. We have been advised that the number of helpers for the trustees has been reduced to one office man and a part-time secretary. We conclude, in view of the changed circumstances, that the reduction of the number of trustees to one is called for" (R. 51).

The statute involved in regard to this appeal and to which the District Judge looked for his authority is nowhere mentioned in the Circuit Court opinion. The pertinent statute as hereinbefore stated is Section 160 of the Bankruptcy Act, 11 U. S. C. A. 560, and reads as follows:

> "In any case, the judge at any time, without or upon cause shown, may appoint additional trustees or remove trustees and appoint substitute trustees."

When the Congress enacted this section the Senators and Congressmen well knew the law on the subject. Many of them had practiced law and they knew the difficulties confronting the District Judges in reorganization matters. They also knew the then long-established rule as to abuse of discretion. So it came about that they vested in the United States District Court an almost absolute discretion in the matter of the appointment and removal of trustees. This was done with confidence not only in the integrity but in the ability of such judges, and was intended to leave them free from interference on appeal. This confidence in the judges is emphasized by the granting of the power "at any time, without or upon cause shown". This statutory provision gives no appellate court the authority to remove a District Judge's appointees except for gross abuse of discretion amounting to an error of law. Such was the clear Congressional intent. This Court has found in this case that the judge was conscientious in making and holding the appointment of trustees, and the matter resided solely in the District Court's discretion.

In regard to Section 160 of the Bankruptcy Act, Collier has this to say in his 14th edition of Collier on Bankruptcy, Sec. 7.10, p. 2008:

> *"Section 160 gives the judge complete power in all cases to appoint additional or substitute trustees and to remove trustees.* It provides that:
>
> "In any case, the judge at any time, without or upon cause shown, may appoint additional trustees or remove trustees and appoint substitute trustees.'
>
> "Thus the judge may do whatever is necessary in his judgment to further or improve the administration of the reorganization. *No cause need be shown for the appointment of an additional trustee or for the removal of a trustee and the appointment of a substitute; the Judge may act on his own initiative.* Any trustee appointed under Sec. 160, however, must be 'disinterested' to the extent required by Sec. 156 and have the qualifications prescribed by that section." (Italics supplied.)

Section 2a (17) of the Bankruptcy Act, 11 U. S. C. A. 11 (17) which provides for the removal of trustees for cause after a hearing, is inapplicable under Chapter X proceedings since it is in conflict with Section 160 of Chapter X, which as hereinbefore pointed out gives the judge full and *complete power* over the trustees appointed by him. (Note 6 under Section 7.10 of the 14th Edition of Collier on Bankruptcy, page 2009.) (Italics supplied.)

The Appellate Court in its decision failed to place any construction whatever on the statute involved (i. e., Sec. 160 of the Bankruptcy Act above quoted). The opinion ignores the statute entirely. We submit that the District Judge interpreted its power correctly under the statute and acted in accordance with its provisions in refusing the petition.

The District Judge had before him (as the record of the hearing on the application of the Securities & Exchange Commission to reduce the number of trustees to one, held on Wednesday, December 27, 1950, will indicate) (R. 5-25), the following facts:

(a) He had appointed on the filing of the petition for reorganization herein by the debtor the two trustees presently acting, one a certified public accountant of many years experience, and the other an attorney of sound learning and exceptionally wide experience in reorganization work under the statute involved. His services are necessary to the Court since he served prior to the appointment of the present counsel, and his continued services are of major importance.

(b) While it is true, as has been found by this Court, the business of the corporation has been discontinued and the assets sold under a sales plan, there nevertheless remained and still remains much litigation. Two of the most important cases involved in the administration of the debtor's estate, are the suit against the Marine Midland Trust Co. of New York and the suit against the Sterling National Bank & Trust Co. of New York. The first of these suits involves an attempted recovery by the trustees of the debtor corporation of an amount in excess of three quarters of a million dollars, and the second of these suits involves the attempted recovery by the trustees of the debtor corporation of an amount in excess of a half a million dollars. The trustees prior to counsel's appointment, and with counsel after his appointment on November 21, 1949, had been engaged in examining records of various banks in connection with the preparation of these suits for trial; had been engaged in the examination of the records and files of the debtor corporation in regard to all data which might be applicable to such suits; had been and still are engaged in the examination of the officers of the various banks in 21a examinations. The trustees have also objected to the allowance of a great number of creditors' claims, including priority claims aggregating approximately $200,000. These facts were all fully disclosed to the District Judge at the hearing on the motion to reduce the number of the trustees, and it was urged at the hearing that until all this litigation was completed that

the trustees, because of their familiarity with the matters involved in the litigation and their background accounting and legal experience in such matters, should be retained. Even if these matters had not been urged before the District Judge at the hearing as hereinbefore stated, the District Judge was nevertheless familiar with all of these matters because of his close association with the work of the trustees and counsel in regard to this litigation. In his opinion as set forth in the record, the District Judge stated:

> "I was not impressed with the argument that there should be a change in the trusteeship *at this critical point.* However, any subsequent fees or allowances made to the trustees must of necessity be small. They are both still needed to aid in the preparation and institution of suits which are to be commenced in the very near future" (R. 25). (Italics supplied.)

Later in the opinion in discussing the matter of fair *ad interim* allowances, the District Judge stated:

> "The Court considers the dexterity and ability displayed by these officers as well as their standing." (R. 25).

(c) No objection had ever been raised nor has any objection to date been raised as to the ability and integrity of the trustees in carrying out the administration of their trust.

(d) After the discontinuance of the business of the corporation and the sale of its assets, the office force, at the time of the filing of the appeal involved, consisted of one man and two girls in the office maintained by the trustee. At the time of the argument of this case before this Court, the office force consisted of one stenographer. All of the administrative work involved in the first distribution made to creditors was done by the trustees and the two girls in the office. This

included the necessary paper work to make a distribution to 1652 employees involving Social Security, Old Age Benefits and Unemployment Compensation payments and the necessary forms accompanying the same. In addition thereto such distribution included a distribution to approximately 600 unsecured creditors. A subsequent distribution order has involved the same administrative work by the trustees.

We desire to point out again that the District Judge, through his close association with the affairs of the debtor's estate, knew all of these salient facts when he made his decision denying the petition of the Securities & Exchange Commission to remove one of the trustees.

The statute involved, to wit, Section 160 of the Bankruptcy Act hereinabove set forth, gave the District Judge almost *complete power* over the appointment and removal of the trustees, the only exception being that the trustees appointed by him must be disinterested. This matter, however, is not involved in this proceeding.

We therefore urge that the decision of the District Court is only subject to a reversal of an Appellate Court if it is found by such Appellate Court that the District Court has committed a gross abuse of discretion which can only mean "an error of law".

We submit that the District Court did not commit such an abuse of discretion, i. e., an error of law, but on the contrary interpreted the said statute under which he was acting correctly, and acted under it correctly, in retaining the two trustees originally appointed by him.

POINT II.

The United States Court of Appeals for the Third Circuit in reviewing the action of the District Court on refusing to remove one of the trustees appointed by it did not have the power to direct the District Court to remove one of the trustees appointed by it in the absence of a clear showing that the District Court had committed a gross abuse of discretion amounting to an error of law in interpreting the statute under which it was acting.

The Appellate Court in order to reverse the action of the District Court must have found that the Court had committed a gross abuse of discretion, i. e., an error of law, which we submit is not present in this case. As hereinbefore pointed out, no authorities exist interpreting the statute involved, to wit, Section 160 of the Bankruptcy Act, 11 U. S. C. A. 560. There do exist authorities in other circuits and in fact in the Third Circuit where the Appellate Courts have reviewed cases coming to them from the District Court involving the type of abuse of discretion which must exist before the Appellate Court will reverse the action of the District Court.

In re Margolies, et al., 266 F. 203 (C. A. 2, 1920) Judge Hough had this to say, page 203, in regard to the matter of discretionary orders in bankruptcy:

> "We have pointed out that under the statute discretionary orders can be revised only for abuse of discretion, which is error of law (*In re Weidenfeld,* 254 Fed. 680, 166 C. C. A. 175) and that while we can review interlocutory proceedings, it is not advisable so to do. (*In re Strauss,* 211 Fed. 123, 127 C. C. A. 521; *In re Horowitz,* 250 Fed. 106, 162 C. C. A. 278)."

In a later case *In re Brown*, 87 F. 2d 306 (C. A. 2, 1937) Judge Manton, speaking for the Court, in an opinion concurred in by Judges Learned Hand and Chase, said, at page 308:

> "In our review, since this is a proceeding in bankruptcy, we are limited to the questions of law involved. An abuse of discretion which amounts to an error of law we could review. *In re Margolies*, 266 F. 203 (C. C. A. 2) *Fitts* v. *Custer Slide Mining & Development Co.*, 266 F. 864 (C. C. A. 8) there was no such abuse of judicial discretion."

Again in the case of *Quinn* v. *Gardner*, 32 F. 2d 772 (C. A. 8, 1929), Judge Kenyon, speaking for the Court at page 774, had this to say regarding bankruptcy orders generally:

> "General orders made in a bankruptcy court are usually discretionary. This must be so. The peculiar facts and circumstances arising in bankruptcy cases necessitate the exercise of discretion on the part of the referee and judge in making the necessary orders. The appellate courts generally adhere to the rule that they will not interfere with these discretionary orders unless there is an abuse of such discretion. Whether it be termed 'abuse of discretion,' or 'improvident exercise thereof,' the meaning is the same, namely, an error of law. Black on Bankruptcy, Sec. 115; In re Horgan et al. (C. C. A.), 98 F. 414; In re North Star Ice & Coal Co. (D. C.), 252 F. 301; In re Weidenfeld (C. C. A.), 254 F. 677; In re Margolies et al. (C. C. A.), 266 F. 203; In re National Grain Corporation (C. C. A.), 9 F. (2d) 802."

In defining the word discretion the Supreme Court of the United States in the case of *Steamship Styria* v. *Morgan*

(1901), 186 U. S. 1 at page 9, Mr. Justice Shiras speaking said:

> "The term 'discretion' implies the absence of a hard and fast rule. The establishment of a clearly defined rule of action would be the end of *discretion,* and yet discretion should not be a word for arbitrary will or inconsiderate action. 'Discretion means the equitable decision of what is just and proper under the circumstances.' Bouvier, Law Dict. 'Discretion means the liberty or power of acting without other control than one's own judgment.' Webster Dict."

We call the court's attention to the case of *Long* v. *George,* 7 N. E. 2d 149 (Supreme Judicial Court of Massachusetts, 1937), because of the Court's particularly apt statement in defining the meaning of discretion and the abuse thereof. At pages 151 and 152, Justice Lummus, speaking for the Court, said:

> "It has been intimated that the exercise of discretion may be revised at law not only where there has been an error of law, but also where there has been an 'abuse of * * * discretion,' which has been defined as a view or action 'that no conscientious judge, acting intelligently, could honestly have taken.' Davis *v.* Boston Elevated Railway Co., 235 Mass. 482, 497, 502, 126 N. E. 841, 846; Mantho *v.* Nelson, 285 Mass. 156, 188 N. E. 599; Skudris *v.* Williams, 287 Mass. 568, 192 N. E. 63; Murnane *v.* MacDonald (Mass.), 2 N. E. (2d) 194. There may be some question how far, if at all, abuse of discretion actually extends beyond error of law. See Welch *v.* Chase, 213 Mass. 519, 521, 100 N. E. 634."

We call the Court's attention to the case in this Court of *Dickinson Industrial Site* v. *Cowan,* 309 U. S. 382.

Justice Douglas at pages 388 and 389 had this to say in discussing appeals on allowances:

> "One of the purposes of Sec. 77B was to place those fees under more effective control. Buttressing that control was Sec. 77B(c) (9) which, together with former Sec. 24(B), made appeals from compensation orders discretionary with the appellate court. We should not depart from that policy in absence of a clear expression from Congress of its desire for a change. Fee claimants are either officers of the court or fiduciaries, such as members of committees, whose claims for allowance from the estate are based only on service rendered to and benefits received by the estate. Allowance or disallowance involves an exercise of sound discretion by the court based on that statutory standard. Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law—abuse of discretion."

We urge that if the law as stated by Justice Douglas in the case of *Dickinson Industrial Site* v. *Cowan* (*supra*) is applicable to the practice of appellate courts in appeals from allowances, the principals are even more applicable in an appeal from an order regarding the appointment or removal of trustees appointed by District Judges. The trustees again call the attention of the Court to comment of Collier (*supra*), relating to the applicable section of the Bankruptcy Act, to wit, Section 160. Section 160 gives the Judge *complete power* in all cases to appoint additional or substitute trustees or to remove trustees.

The United States Court of Appeals for the Third Circuit in its opinion in this case recognized the applicability of the foregoing language used by Justice Douglas when it cited this case in support of its statement:

> "We start with the undisputed premise that the matters in question are for the discretion of the district judge."

The United States Court of Appeals for the Third Circuit in the case of *In Re McGann Manufacturing Company, Inc.*, 195 F. (2d) 845 (C. A. 3, 1951), had this to say at page 847 in regard to discretionary matters on appeal before it in reorganization proceedings:

> "The fundamental question involved is the extent to which the district court can require a lien creditor to suffer the possibility of ultimate loss in order that a debtor and other creditors may have an opportunity to effect a plan of reorganization. Such a question is primarily one for the district court, and the determination of that court will not be reversed except for a clear abuse of discretion."

The Court cited the following cases in support thereof: *In re Island Park Associates*, 77 F. 2d 334, 337 (C. A. 2, 1935); *Oakland Hotel Co.* v. *Crocker First Nat. Bank*, 85 F. 2d 959 (C. A. 9, 1936).

The attorney for the Securities & Exchange Commission, in his argument before the United States Court of Appeals for the Third Circuit, in speaking of the District Judge's decision in the matter involved, spoke "in general terms about what a conscientious judge would do in such a case as this, with an implied suggestion that what a conscientious judge would have done has not been done by the District Judge who handled this case" (Opinion of the Circuit Court, R. 51). The Circuit Court went on to state, "We find not a syllable in the record to suggest any basis for such talk. We know the District Judge to be learned, experienced and conscientious. He has done his judicial duty in deciding a case presented to him. We do ours in

disagreeing with him when we must. Our action is impersonal, as was his. There is no excuse for going outside the record and suggesting failings in any judicial officer for which there is no foundation" (R. 51).

We submit that the Circuit Court has in effect found that the District Judge, after giving full consideration to all the matters before him, conscientiously decided that the two trustees appointed by him were needed and that therefore the petition of the Securities & Exchange Commission should be denied. It certainly at no place in its opinion pointed out any facts which in any way indicated that the District Judge had committed a gross abuse of discretion amounting to an error of law.

The District Judge in the case at bar has been closely associated with the administration of the estate of the debtor with his trustees, the petitioners herein, since their appointment. He appointed trustees of high caliber who have worked long and ardently to give the best administration possible to the affairs of the debtor. Both the District Judge and the trustees have given undivided attention to the administration of the affairs of the debtor, and the District Judge has found in his opinion that (he) "was not impressed with the argument that there should be a change in the trusteeship at this critical time • • • they (the trustees) are both still needed to aid in the preparation and institution of suits which are to be commenced in the very near future" (R. 25). We urge that no one could know better than the District Judge the necessity for the retention of the trustees appointed by him in the first instance.

The facts before the Circuit Court, we urge, did not show that the District Judge has committed a gross abuse of discretion as defined by the Courts, to wit, an error of

law, in interpreting Section 160 of the Bankruptcy Act (*supra*) under which he appointed the trustees nor did the Circuit Court so find in its opinion.

Conclusion.

It is respectfully submitted that a writ of certiorari should issue in accordance with the prayer of the trustees' petition.

Respectfully submitted,

JAMES D. CARPENTER,
SAMUEL M. COOMBS, JR.,
Counsel for Trustees-Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 385

JOHN J. MCGIRL AND GEORGE FURST, TRUSTEES OF SOLAR MANUFACTURING CORPORATION, PETITIONERS

v.

BEN MINTZ AND SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 49–51) is reported at 190 F. 2d 273. The opinion of the District Court (R. 25–26) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered June 28, 1951 (R. 52), and a petition for rehearing was denied August 20, 1951 (R. 66). The petition for a writ of certiorari was filed October 16, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals was justified in reversing an order of the District Court refusing to reduce the number of the debtor's trustees from two to one after the debtor's business had been sold and its only remaining assets were cash and potential lawsuits.

STATUTE INVOLVED

Pertinent provisions of Chapter X of the Bankruptcy Act (11 U. S. C 501 *et seq.*) are set out in the Appendix *infra.*

STATEMENT

The order of the Court of Appeals for the Third Circuit which petitioners seek to review reversed an order of the District Court for the District of New Jersey in a proceeding under Chapter X of the Bankruptcy Act to reorganize the Solar Manufacturing Corporation, an insolvent debtor (R. 52). The District Court's order denied the petition of this Commission to reduce the number of trustees from two to one (R. 26).[1]

On December 14, 1948, when the present Chapter X proceeding was instituted and the trustees who are petitioners herein were appointed, the debtor was engaged in the manufacture and sale of electronic devices (R. 2). It operated three factories in New Jersey and, as noted by the court

[1] This Commission has been a party to these proceedings pursuant to Section 208 of the Bankruptcy Act, 11 U. S. C. 608.

below, "It had a force of several hundred employees" (R. 2, 51). Its sales the preceding year had been about five million dollars (R. 3).

The trustees operated the business until August 1, 1949. Then, having secured an order approving a proposed sale of the debtor's assets, they ceased manufacturing operations completely. Although that order was subsequently reversed because the sale had not been embodied in a plan of reorganization,[2] manufacturing operations were never resumed. On April 6, 1950, a plan was effectuated whereby all the debtor's assets except cash and causes of action were sold for $815,000. This was approximately $300,000 more than the sale that had earlier been urged by the trustees, and the liquidation increased the debtor's cash on hand to approximately $1,230,000.[3] As against this were liabilities which, as of June 30, 1950, amounted to approximately $3,642,000 (R. 3, 7–8, 29, 35).

Since consummation of the plan in April, 1950, the only remaining functions for the trustees have been the distribution of the cash, the defense of disputed claims and the prosecution of causes of action on behalf of the estate (R. 3–4, 30–31). When the Commission made its motion to reduce

[2] *In re Solar Manufacturing Corp.*, 176 F. 2d 492 (C. A. 3).

[3] Prior to the institution of the Chapter X proceeding the debtor had received a substantial amount of cash from the sale of a plant it owned in Chicago.

the number of trustees in December, 1950, the administration of the estate was almost completely stalled. No distribution of cash had yet been made and there appeared to be little effort on the part of the trustees to effect prompt disposition of claims for preference, although the pendency of these claims was delaying distribution (R. 16, 38–39). Delay had also characterized the trustees' handling of objections to the accounting of the debtor's former indenture trustee, and of objections to the latter's claim of more than $300,000 (R. 19, 36–37), and had characterized the trustees' exploration of possible causes of action against persons formerly associated with the debtors that had been indicated in examinations conducted pursuant to Sections 21 (a) and 167 of the Bankruptcy Act, 11 U. S. C. 44 and 567 (R. 44–45).

During all this period expenses were continuing. Recurring items arising out of the maintenance of an office by the trustees amounted to almost $2,000 a month (R. 4). Another substantial item was the interim allowances sought by the petitioners. On December 27, 1949, petitioners had each been awarded interim allowances of $12,500 (R. 31). In the period for which compensation was then sought they had operated the debtor's business and had effected a sale of the property pursuant to a plan of reorganization (R. 2, 3, 8, 40). In addition, one of the trustees, who was an attorney,

had carried on the legal duties of the trusteeship for several months (R. 30).

When the Commission's motion to reduce the number of trustees was made in December, 1950, there was pending before the District Court another application for interim allowances by the trustees as well as an application for allowances by their counsel. The schedule accompanying the trustees' petition showed an aggregate of 2,391 hours expended during the preceding year, but it did not disclose the nature of the activities performed. It appeared that to a great extent the trustees spent their time consulting with each other (R. 4, 10, 46). Although allowances at this time were opposed by the Commission and other parties, the court granted allowances of $8,000 each to the trustees and $15,000 to their counsel (R. 50).

The court below considered in a single opinion appeals from the order of December 28, 1950, granting interim allowances to the trustees and their counsel, and the order of January 4, 1951, denying this Commission's motion to reduce the number of trustees to one. In its opinion the Court of Appeals pointed out with respect to the interim allowances that, if it were to have exercised judgment in the first instance, it would "have made the allowance to counsel and not to the trustees" but that it did not feel it should substitute its "discretion for that of the District Court" (R. 50). With respect to the motion to

reduce the number of trustees to one, the court was "unable to concur with the trial judge, even bearing in mind that the matter [was] one for his discretion in the first instance" (R. 51). It is the order reversing the denial of the Commission's motion to reduce to one the number of trustees which the present petition seeks to review. No review has been sought of the decision below with respect to interim allowances.

ARGUMENT

The decision below was correct and does not warrant review by this Court.

One of the major purposes of the provisions for corporate reorganization under the Bankruptcy Act was the elimination of the inordinate expense and delays involved in the former equity receivership procedure.[4] The record before the court below made it clear that the practical result of the administration of the debtor's estate by two trustees, where the work could be accomplished as easily by one since the estate had been reduced to cash and choses in action, would result in larger over-all fees, and that affirmance of the order permitting the two trustees to continue would encourage continued delay and concomitant additional expense. To deny the Court of Appeals

[4] See *Brown* v. *Gerdes*, 321 U. S. 178, 181; *Callaghan* v. *RFC*, 297 U. S. 464, 468; *Greensfelder* v. *St. Louis Public Service Co.*, 114 F. 2d 53 (C. A. 8), certiorari denied, *sub nom. Stein* v. *St. Louis Public Service Co.*, 311 U. S. 714.

power to require corrective measures would be to deprive it of the routine supervisory power over bankruptcies within its circuit which Congress clearly intended it should have by explicitly providing that the appellate jurisdiction of Courts of Appeals should extend to all interlocutory as well as final proceedings.[5]

Petitioners rely on Section 160 of Chapter X, which gives the district judge the power "at any time, without or upon cause shown" to "appoint additional trustees or remove trustees and appoint substitute trustees." They argue that this section gives the District Court "almost absolute discretion" and "almost *complete power*" with respect to the appointment and removal of trustees so long as the trustees are disinterested (Pet. 8, 17). That the district court has a broad discretion in the appointment of trustees was specifically recognized by the court below (R. 49). That court made clear by its ruling on the appeal from the fee allowance that it left a wide range for matters of district courts' discretion. But Section 160 obviously does not make this discretion absolute. It must be read in its context in Chapter X, which contemplates the operation of the debtor as a going concern (Section 189, 11 U. S. C. 589) and authorizes the judge to appoint "one or more" disinterested trustees

[5] See Bankruptcy Act, Section 24 (a), 11 U. S. C., Supp. IV, 47 (a), made applicable to Chapter X proceedings by Section 102, 11 U. S. C. 502.

(Section 156, 11 U. S. C. 556). In view of the provision in ordinary bankruptcy proceedings for removal of the creditor-elected trustees only "for cause" and "upon hearing after notice,"[6] Section 160 appears to have been designed to assure flexibility by authorizing the judge to vary the number of trustees in accordance with the necessities of administration. It was directly contrary to the spirit of that section for the District Court to refuse to reduce the number of trustees from two to one after the debtor's business had been reduced to cash.

This case presents no conflict between circuits. We are aware of no other case where a court has denied a motion to reduce the number of trustees after the estate has been liquidated. There are precedents, however, for the substitution of a single trustee for several trustees after the liquidation of the estate.[7] The action of the court be-

[6] Bankruptcy Act Section 2 (a) (17), 11 U. S. C. 11 (a) (17); and see Section 44 (a), 11 U. S. C. 72 (a). Even in ordinary bankruptcy a trustee has no "vested right" to his office. *In re Schireson*, 45 F. Supp. 416 (E. D. Pa.).

Section 44 (a) authorizes the appointment of more than one trustee in an ordinary bankruptcy but it is elsewhere explicitly provided that in no event may the fees exceed that to which a single trustee would be entitled. (Bankruptcy Act Section 48 (d), 11 U. S. C. 76 (d).) The more liberal compensation provisions of Chapter X (Section 241 *et seq.*, 11 U. S. C. 641 *et seq.*) emphasize the importance of eliminating unnecessary trustees in proceedings thereunder.

[7] See e. g., *In the Matter of Chicago Railways Company* (N. D. Ill., E. D. Nos. 63584 and 71912, consol.). After a plan of reorganization had been consummated for the

low, moreover, was consistent with statements of the Court of Appeals for the Second Circuit to the effect that economical administration would permit more than one trustee only in the exceptional case.[8]

Chicago Surface Lines in September, 1947, a single trustee was substituted for the four trustees who previously had supervised the operation of the estate and the reorganization. The judge stated from the bench that no more than one trustee was needed for the purpose of handling the liquidation of the estate.

See also *In re Associated Gas and Electric Corporation*, (S. D. N. Y. No. 75635, Order No. 710). Upon petition of the trustees reciting that consummation had been effected, the judge, by order of February 6, 1946, accepted their resignation and appointed a single substitute trustee to act as his own attorney, primarily to conduct extensive litigation for recovery of estate assets.

[8] *Meredith* v. *Thralls*, 144 F. 2d 473, 474 (C. A. 2), certiorari denied, *sub nom. Consolidated Realty Corp.* v. *Meredith*, 323 U. S. 758.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1951.

APPENDIX

The Bankruptcy Act, 30 Stat. 544, as amended, 52 Stat. 840, 62 Stat. 991, provides in pertinent part:

Section 24, 11 U. S. C., Supp. IV. 47:

Jurdisdiction of Appellate Courts.—a. The United States court of appeals and the United States court of appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: * * *.

Section 156, 11 U. S. C. 556:

Upon the approval of a petition, the judge shall, if the indebtedness of a debtor, liquidated as to amount and not contingent as to liability, is $250,000 or over, appoint one or more trustees. Any trustee appointed under this chapter shall be disinterested and shall have the qualifications prescribed in section 45 of this Act, except that the trustee need not reside or have his office within the district. * * *

Section 160, 11 U. S. C. 560:

In any case, the judge at any time, without or upon cause shown, may appoint additional trustees or remove trustees and appoint substitute trustees.

Section 189, 11 U. S. C. 589:

A trustee or debtor in possession, upon authorization by the judge, shall operate the business and manage the property of the debtor during such period, limited or indefinite, as the judge may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.

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No. 385

IN THE

Supreme Court of the United States

October Term, 1951

JOHN J. McGIRL and GEORGE FURST, Trustees of SOLAR MANUFACTURING CORP.,

Petitioners,

vs.

BEN MINTZ and SECURITIES AND EXCHANGE COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT BEN MINTZ IN OPPOSITION

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IN THE

Supreme Court of the United States

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JOHN J. McGIRL and GEORGE FURST, Trustees of SOLAR MANUFACTURING CORP.,

Petitioners,

vs.

BEN MINTZ and SECURITIES AND EXCHANGE COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT BEN MINTZ IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Third Circuit (R. 49-51) is reported at 190 F. 2d 273. The opinion of the District Court (R. 25-26) is reported at 94 F. Supp. 878.

Jurisdiction

The judgment of the Court of Appeals was filed on June 28, 1951 (R. 52). A petition for rehearing, filed on July 13, 1951 (R. 53-65) was denied by that Court by order

filed August 20, 1951 (R. 66). The petition for certiorari was filed on October 16, 1951. The jurisdiction of the Court is invoked under 28 U. S. C., Sec. 1254(1), 62 Stat. 928.

Question Presented

The physical assets of a debtor in a Chapter X proceeding, initially operated by two co-trustees, have all been sold. The number of employees has been reduced from several hundred to one or two. The only remaining business of the estate consists of the distribution of assets, objections to claims, and the pursuit of claims against third parties. The assets are insufficient to pay more than a small proportion of the creditors' claims. Virtually all creditors who were heard on a petition of the Securities and Exchange Commission to reduce the number of trustees from two to one supported the petition, and none opposed.

The question is, Under these circumstances did the Court of Appeals err in reversing the refusal of the District Judge to reduce the number of trustees to one?

Statement of the Case

The proceeding was initiated by a voluntary petition, filed December 14, 1948, whereupon the present petitioners were appointed trustees (R. 2). The trustees continued the debtor's manufacture of electronic devices until August 1, 1949, when, pursuant to court order, they ceased operations (R. 3, 34). The debtor's sales for the years 1948 and 1949 were as follows (R. 3, 29, 40):

1948	$4,838,217
1949	1,494,590

On July 19, 1949, the District Court on petition of the trustees ordered a sale of the debtor's assets outside of a

reorganization for the sum of $525,000. *In re Solar Mfg. Corp.*, 176 F. 2d 493 (1949). On appeals by wage claimants, including respondent Mintz, appearing on behalf of approximately five hundred such claimants (R. 32), by the collective bargaining agent of these employees of the debtor, United Electrical, Radio and Machine Workers of America, Local 427, and by debenture holders, the Court of Appeals reversed, on the ground that such a sale could be made only pursuant to a reorganization plan (*ibid.*). The trustees then proposed the sale of the debtor's assets pursuant to a plan, which, after the usual proceedings, was confirmed. On April 6, 1950, virtually all the physical assets were sold for $815,000 (R. 3, 30, 34-35), approximately $300,000 more than the proceeds which would have been realized by the trustees' original proposal. Since then the assets, apart from possible causes of action, have consisted solely of cash, which has declined as follows (R. 3, 30, 35):

May 1, 1950	$1,232,810
November 1, 1950	1,165,675

No cash receipts of consequence occurred during the latter part of this period (R. 30). After priority claims, there remained as of June 30, 1950 less than $900,000 for unsecured claims of $3,341,377 (R. 4, 31, 35).

Interim allowances have been granted by the District Court as follows (R. 31-32, 40-41, 50):

Order of	Geo. Furst Trustee	John J. McGirl Trustee	Samuel M. Coombs Jr., Counsel
Dec. 27, 1949	$12,500	$12,500	
Dec. 28, 1950	8,000	8,000	$15,000
	$20,500	$20,500	$15,000
Grand Total			$56,000

Since the cessation of the debtor's operations in August 1949, and certainly so since the sale of its operating proper-

ties in April 1950, activity in the estate, other than routine administration, has virtually ceased (R. 50). The business since remaining has been the processing and distribution of claims of creditors, including taxes due on payments to employees (R. 57), which could consist of nothing but paper work, and the pursuit of claims against and objections to claims of third parties, which involve legal work. (See R. 30-31, 36-37, 43-45 for details.)

A petition of the trustees for interim allowances for the period December 1, 1949 to November 24, 1950 disclosed what appeared to be an inordinately large amount of time spent on work on such affairs as the debtor had remaining. Trustee McGirl claimed 1,542 hours of service and Trustee Furst 849 hours, approximately half the hours in each case having been expended since the sale of the properties in April 1950 (R. 4, 32, 40-41). It appeared furthermore that virtually all the time claimed by Furst was spent in conjuction with McGirl and in his company (*idem*).

While the trustees' application was pending, the Securities and Exchange Commission, reciting many of the facts here set forth, petitioned for the reduction of the number of trustees from two to one (R. 2-5). No denial or other answer was made by the trustees. At a hearing on the petition, which was held together with the trustees' allowance application, virtually all the creditors who were heard expressed support (R. 12-21, 23, 24) and none expressed opposition (R. 21-24). In an opinion of December 28, 1950 and by order of January 4, 1951, the District Judge, however, denied the petition (R. 25-26).

Appeals, later consolidated, were taken from this order and from an order of December 28, 1950 granting interim allowances (R. 48). The Court of Appeals affirmed the District Judge's award of interim allowances and reversed his refusal to reduce the number of trustees to one (R. 49-52). Rehearing on the latter issue on application of the trustees

was denied (R. 53-66). The District Judge directed the trustees to petition this Court for certiorari to review the determination that the number of trustees be reduced (R. 67-68). No review is sought of the affirmance of the District Court's interim allowances.

ARGUMENT

Respondent believes that the petition, which seeks to fasten two trustees upon the reorganization, is without merit. The Court of Appeals clearly acted correctly. No important question of federal law is involved, and the decision is in accord with the objective of the reorganization statute and with the authorities which relate to the issue. The problem is not a recurring one and does not call for guidance by the Court.

The District Court was here reversed on a matter within its discretion. But the supervisory powers of an appellate court in bankruptcy matters clearly required such action, especially since the absence of any factual issues enabled the Court of Appeals to resort readily to its own sound judgment. The exercise of such supervisory powers does not appear to warrant review by the Court.

I.

The judgment below was correct.

The ruling of the Court of Appeals that the reorganization should be conducted by one rather than two trustees was indubitably the correct one.

An objective of the corporate reorganization statutes was to establish more effective control over fees and expenses in reorganization. *Brown* v. *Gerdes*, 321 U. S. 178, 181 (1944); *Dickinson Industrial Site, Inc.* v. *Cowan*, 309

U. S. 382, 388 (1940). In the interests of economy, only a compelling reason should justify the retention of more than the minimum number of trustees. *Meredith* v. *Thralls*, 144 F. 2d 473, 474 (C. A. 2, 1944), cert. den., 323 U. S. 758 (1944); *In re Ocean City Auto Bridge Co.*, 184 F. 2d 726, 729 (C. A. 3, 1950). "The trustee," it has been held, "* * * has no vested right to his office. His term of service does not extend beyond the time when it appears to the Court that it is no longer for the best interests of the estate that he should continue to act as trustee." *In re Schireson*, 45 F. Supp. 416 (E. D. Pa., 1940).

Flexibility in this regard is assured by the statute, which provides, in the broadest possible terms:

> "In any case, the judge at any time, without or upon cause shown, may appoint additional trustees or remove trustees and appoint substitute trustees." Bankruptcy Act, Ch. X, Sec. 160, 11 U. S. C., Sec. 560.

With these powers, the judge may act freely both in matters of appointment and removal, bearing in mind, of course, the overall statutory policy that the estate be economically managed.

In the light of considerations of this nature, the decision of the Court of Appeals was fully justified by the facts before it. Its opinion pointed to the cessation of the debtor's manufacturing business, and the elimination of all but two employees (R. 51). It properly characterized the trustees' remaining business, apart from the distribution of assets, as "legal business" (*ibid.*). Its conclusion that more than one trustee would be superfluous was thus based on specific factual considerations.

These should be contrasted with the conclusory statements indulged in by the District Judge. The latter said (R. 25):

> "* * * I was not impressed by the argument that there should be a change in the trusteeship at this critical time * * *. They (the trustees) are both still needed to aid in the preparation and institution of suits which are to be commenced in the very near future." (Matter in parentheses added.)

These passages constitute the sum total of the District Court's rationale for retaining two trustees. They state no more than the Court's conclusion that two trustees are needed to aid in the impending litigation. But they assert no facts to demonstrate why two rather than one are needed, or why the time was "critical." In fact, the sentence accompanying the quoted passage stated that "any subsequent fees or allowances made to the trustees must of necessity be small." This clearly contradicts any implication that the activities to be engaged in by the trustees were so important and critical as to require that both continue to serve. As against the conclusory and inconsistent holding of the District Court, the facts in the record recited by the Court of Appeals clearly warranted its action in reversing.

II.

No important question of federal law or conflict with other authorities was involved in the judgment below.

It is difficult to see why this routine correction of a patent error attains the importance of a question worthy of further review. The problem occurs most infrequently, if it has ever occurred at all. In view of its rarity the federal question which the case decides can hardly be considered momentous, and perhaps even significant, in the field of corporate reorganization. No cases have been encountered which, in conflict with it, hold that on the basis of similar

facts two trustees must or may be retained, or that a district court's refusal to reduce the number of trustees is beyond the power of review of an appellate court. On the contrary, the decision of the Court of Appeals conformed to the statutory policy of an economical administration of a bankrupt estate. And insofar as there are authorities which bear on the question,[1] its action was in accordance with their underlying approach.

Petitioners assert, however, that the decision below was in conflict with holdings that a discretionary ruling may be reversed on appeal only in the event of a gross abuse of discretion (Petition and brief, pp. 7-8, 18 ff.), and complain, perhaps somewhat insistently (*ibid.*, 8, 9, 11, 13, 17, 23-24), that no reversal was possible absent a finding by the Court of Appeals of a "gross abuse of discretion amounting to an error of law." Ready answers to this dual contention suggest themselves. The Court of Appeals clearly recognized the District Court's discretionary authority on both the allowance and the removal questions (R. 50-51). In fact, on the matter of allowances it deferred to the determination of the District Court.[2] To require that a sophisticated tribunal further demonstrate its awareness by the incantation of specific language, or, as petitioners also suggest, by a citation of the statute (Petition and brief, p. 14), would apotheosize literalness and form.

But the error goes deeper. It involves a fundamental misapprehension of the function of an appellate tribunal in bankruptcy and reorganization matters. For in these spheres, reviewing courts have traditionally exercised their powers in broad supervision and guidance.

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[1] See cases cited *supra*, pp. 5, 6; see also *In re Chicago Railways Co.* (N. D. Ill., E. D., Nos. 63584 and 71912, consolidated) where, in September, 1947, after consummation of a plan of reorganization, one trustee was substituted for four.

[2] It stated, "If we were to exercise judgment in the first instance it is likely that we should have made the allowance to counsel and not to the trustees." But it concluded that "we are not here entitled to substitute our discretion for that of the District Court * * *" (R. 50).

The scope of appellate jurisdiction in bankruptcy set forth in Section 24 of the Bankruptcy Act, 11 U. S. C., Sec. 47, made applicable to reorganizations (where not inconsistent with the provisions of Chapter X) by Section 121 of Chapter X, 11 U. S. C., Sec. 521, invests the courts of appeals "with appellate jurisdiction * * * in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact. * * *" The breadth of the powers thus conferred is evidenced by the language of Section 128 of the Judicial Code of 1911, as amended (28 U. S. C., Sec. 225(c) prior to the revision of 1948), where the jurisdiction conferred upon the circuit courts over matters of bankruptcy was prescribed as "appellate and supervisory."[3] In *McClelland* v. *Greenberg*, 142 F. 2d 245, 248 (C. A. 2, 1944), Judge Frank noted "that bankruptcy proceedings, since they are administrative, are not wholly like ordinary litigation and that we have power to guide the administration of the estate to prevent waste."

It is accordingly difficult to accept a contention which so exalts the power of the District Court on the removal or retention of trustees as to make it virtually free of appellate scrutiny (*cf.* Petition and Brief, pp. 13-14). For notwithstanding the breadth of the powers conferred upon the District Judge by Section 160 of the Bankruptcy Act, their exercise is nowhere placed beyond the scope of the review provisions of the statute.

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[3] The elimination of a specific reference in the present Title 28 to appellate bankruptcy jurisdiction is due to the fact that the subject was regarded "as covered by 11 U. S. C. 47 * * * (*i.e.*, Section 24 of the Bankruptcy Act, *supra*) and by the general provisions of the new Code in 28 U. S. C. 1291." 10 Cyc. Fed. Proc. (2d ed.) 1950 Cum. Supp. 19, n. 56 to Sec. 4795. The Reviser's notes to Section 1291 of the new code do not indicate that any diminution in the scope of bankruptcy review was intended by the elimination. U. S. Code Cong. Svc. (80th Cong., 2d Sess., 1948) 1827.

In fact, much of the potency of the rule normally requiring appellate deference to a lower Court's discretion is lacking here by reason of the posture in which the matter arose. The petition of the Securities and Exchange Commission to reduce the number of trustees went undenied, as has been stated. No testimony was taken at the hearing, which consisted exclusively of colloquy of counsel and the judge (R. 5-25). There were thus no issues of fact, no questions of veracity, which the District Judge would have been uniquely qualified to pass on. In such a situation the familiar doctrine expressed in *In re A. Roth Co.*, 125 F. 2d 396 at 398 (C. A. 7, 1942)—an appeal in bankruptcy—is nicely fitting:

> "Determination of abuse of discretion involves the exercise, by us, of sound judgment upon the facts. * * * If, however, facts are not in dispute and it is a question of sound judgment based upon the undisputed facts which are before us as fully as before the trial judge, we are in about as good a position as he to say whether the discretion has been wisely exercised. In short, both trial and appellate court have the same situation upon which to exercise the same sound discretion."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 16, 1951.

Office-Supreme Court,
FILED
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 385

JOHN J. McGIRL and GEORGE FURST, Trustees of SOLAR MANUFACTURING CORPORATION,

Petitioners,

vs.

BEN MINTZ and SECURITIES AND EXCHANGE COMMISSION,

Respondents.

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT, BEN MINTZ.

SAMUEL M. COOMBS, JR.,
Attorney for Petitioners.

JAMES D. CARPENTER,
Of Counsel.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Trustees-Petitioners, after a review of the brief of the respondent, Ben Mintz, in opposition to the Trustees' Petition for Writ of Certiorari, have deemed it necessary to file a short reply brief in order to correct the patent misconception of the fundamental questions involved which are (1) did the District Court commit a gross abuse of discretion amounting to an error of law in interpreting Section 160 of the Bankruptcy Act under which it appointed the Trustees and if it did not (2) did the United States Court of Appeals for the Third Circuit have the power to direct the District Court to remove one of the Trustees appointed by it.

Under Point I of the respondent's brief, the respondent concludes that "the Court of Appeals was fully justified by the facts before it" in arriving at the decision it did. It must, however, be remembered that the District Court had before it not only the facts that the Circuit Court had before it, but also had before it all of the facts concerned with the administration of the debtor's estate by the Trustees since the filing of the petition of reorganization and the appointment of the Trustees on December 14, 1948. As pointed out in the petitioners' main brief, the District Judge has been most intimately associated with the affairs of the debtor's estate since its inception and, therefore, found, as set forth in his opinion (R. 25):

> "I was not impressed with the argument that there should be a change in the trusteeship at this critical point. However, any subsequent fees or allowances made to the trustees must of necessity be small. They are both still needed to aid in the preparation and institution of suits which are to be commenced in the very near future."

From his intimate acquaintance with the two suits presently pending, involving in excess of one million dollars (R. 44), we submit that the District Judge was entirely warranted in his finding that one of the Trustees should not be discharged at this "critical time" and that they were both needed to aid in such impending litigation.

Under Point II the respondent states that it is difficult to accept a contention "which so exalts the power of the District Court on the removal or retention of trustees as to make it virtually free of appellate scrutiny" (Respondent's Brief, p. 9).

We desire to point out that the petitioners' in their main brief under Point II have "exalted" no power of the

District Court but have cited cases supporting the simple and fundamental proposition of law that the Appellate Court, absent a clear showing that the District Court had committed a gross abuse of discretion, amounting to an error of law in interpreting the statute under which it was acting, should not have reversed the District Court in its decision, refusing to remove one of the Trustees appointed by it.

The respondent under Point II of his brief reaches the unwarranted conclusion that the Appellate Court had the supervisory power to revise the District Court's decision in a matter involving the fundamental exercise of discretion by the District Court. This conclusion is certainly erroneous.

The power given Circuit Courts of Appeals to superintend and revise, in matters of law, the proceedings of inferior Courts of Bankruptcy, we submit, does not authorize the revising Court to exercise the discretion vested in the Courts of Bankruptcy, nor in ordinary cases to revise the exercise of such discretion.

In the case of *In Re Judkins Co.*, 205 F. 892 (CA 1, 1913) the District Court of the United States for the District of Massachusetts, on application to it, revoked the reference and made a new reference to a new referee. The bankrupt company filed a petition to the Circuit Court of Appeals under Section 24(b) of the Bankruptcy Act, which gave the Circuit Courts of Appeals jurisdiction on such petitions to superintend and revise, in matters of law, the proceedings of the Courts of Bankruptcy, the purpose being to reinstate the original referee.

In a *Per Curiam* opinion at page 894, the Court said:

> "There is so much discretion given the courts of bankruptcy in the matter of selecting referees that

> we question whether we have the power to 'superintend and revise' under circumstances like the present within the meaning of the statute; it being clear that we cannot exercise the discretion vested in the courts of bankruptcy, nor revise the exercise of their discretion in ordinary cases of this kind."

We submit that the same discretion given Courts of Bankruptcy in the matter of selecting referees is involved in the appointment and removal of Trustees by the District Court under Section 160 of the Bankruptcy Act involved in the case at bar.

In the case of *In Re Diamond Fuel Co.* (6 F. 2d 773 CA 2, 1925) Judge Rogers had this to say at page 776:

> "This court, in Re Grant, 238 F. 132, 151 C. C. A. 208, again had before it an appeal from an allowance of fees to the attorneys for the bankrupt. We declined in that case to interfere and said: 'In a proceeding in bankruptcy there are many matters which are not governed by a fixed rule, but are confided to the sound judicial discretion of the judge. His decision in such cases may be brought before the Circuit Court of Appeals for review. But the appellate courts have established the rule that in such cases they will not reverse, unless the decision below was unmistakably wrong, or unless a plain abuse of discretion is shown. In re S. B. Judkins Co., 205 Fed. 892, 124 C. C. A. 205; Black on Bankruptcy, §48.' We adhere to what the court said in that case. We have the right to review such cases for the purpose of ascertaining whether the court below has proceeded, in our opinion, contrary to correct principles of law, or has in some way abused the sound discretion with which it is invested by the Bankruptcy Act."

See also the cases cited under Point II of petitioner's main brief, pages 18 to 22, inclusive.

We submit, therefore, that the United States Court of Appeals for the Third Circuit not having found that the District Court had committed a gross abuse of discretion as defined by the Courts, to wit, an error of law in interpreting Section 160 of the Bankruptcy Act, was not authorized to exercise any supervisory power vested in it nor to exercise the discretion vested in the District Court nor to revise the exercise of such discretion.

Respectfully submitted,

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